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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE HELEN MINING COMPANY, and
KENTLAND-ELKHORN COAL CORPORATION,
Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

and

UNITED MINE WORKERS OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The Court of Appeals for the District of Columbia Circuit has, in this case, quite flagrantly overstepped the bounds of the judiciary's role and intruded upon the province of the legislature to achieve a result it believed Congress should have legislated, but in fact did not, with respect to the Federal Mine Safety and Health Act, 30 U.S.C. § 801 *et seq.* (Supp. IV 1980) ("Mine Act"). The panel majority held that the right of miners to be compensated for accompanying federal inspectors during mine inspections extends to all types of inspections, including spot inspections required by Section 103(i) of the Mine Act. 30 U.S.C. § 813(i). To achieve this result, the court rendered meaningless the limitation found in Section 103(f) that the "walkaround pay right"[1] attaches only to inspections conducted "pursuant to the provisions of subsection (a)." 30 U.S.C. § 813(f).

In extending the walkaround pay right to spot inspections, the court completely ignored the only relevant and explicit legislative history pertaining to Section 103(f). This legislative history is clear, uncontradicted and authoritative, and the court's refusal to consider it directly conflicts with the teachings of this Court that dispositive legislative history, when available, must *always* be consulted to interpret statutory language properly. The court also rejected the reasoning and compelling authority of the contrary decision of the Federal Mine Safety

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[1] The "walkaround pay right" refers to the statutory right of miners' representatives to be compensated for accompanying federal inspectors on inspections "made pursuant to the provisions of subsection (a)." Section 103(f), 30 U.S.C. § 813(f).

and Health Review Commission.[2] This refusal to accord *any* deference to the Commission's decision stripped the Commission of the policymaking and adjudicative functions for which Congress explicitly had created the Commission and established a conflict with courts of appeals that have accorded substantial deference to decisions of federal safety and health review commissions.

The reason for the court's refusal to abide by the legislative history and the Commission's decision is clear. Both the legislative history and the Commission unequivocally resolved the walkaround compensation issue so as to limit the walkaround pay right to regular inspections[3]—a result the court felt was contrary to what Congress should have legislated. The court's opinion in

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[2] The Federal Mine Safety & Health Review Commission ("Commission") is an independent agency created by Congress to establish a consistent body of law interpreting the Mine Act and its implementing regulations. Section 113, 30 U.S.C. § 823. The Commission was named Respondent in the proceedings before the court of appeals but declined to participate actively in the proceedings and instead relied on its decision. The other parties before the court of appeals were the Secretary of Labor (originally Ray Marshall and now Raymond J. Donovan) and the United Mine Workers of America as Petitioners. The Helen Mining Company, Kentland-Elkhorn Coal Corporation and Allied Chemical Corporation appeared as Intervenor-Respondents. The Helen Mining Company and Kentland-Elkhorn Coal Corporation are petitioning for this writ of certiorari. A list of the parents, subsidiaries and affiliates of The Helen Mining Company and Kentland-Elkhorn Coal Corporation appear as Appendix P.

[3] The term "regular" inspection has been used throughout the litigation by all parties to indicate the four full inspections of underground mines required each year by Section 103(a). The term "spot" inspection has been similarly used and refers to all inspections that are not regular inspections, such as those required by Section 103(i).

this case violated clear Supreme Court precedent, created a conflict among the circuits, and eviscerated the statutory scheme with respect to the Commission's role under the Mine Act. The decision should be reversed.

Petitioners seek review of the following questions:

1. Whether the court of appeals' decision ignoring clear, authoritative, and dispositive legislative history in the face of an ambiguous statute was contrary to this Court's numerous holdings that legislative history is always relevant to discerning the meaning of a statute.
2. Whether the court of appeals erred in refusing to grant any deference to the decision of the Federal Mine Safety and Health Review Commission, the expert agency Congress created to interpret the Mine Act.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, The Helen Mining Company and Kentland-Elkhorn Coal Corporation, ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on February 23, 1982. Petitioners' petition for rehearing and suggestion for rehearing *en banc* were denied on April 9, 1982.

PRIOR OPINIONS

The court of appeals consolidated appeals by the United Mine Workers of America and Secretary of Labor

("Secretary") of three Commission decisions involving respectively The Helen Mining Company, Kentland-Elkhorn Coal Corporation, and Allied Chemical Corporation. The court's decision on these consolidated cases, from which Petitioners request this writ of certiorari, is *United Mine Workers of America v. Federal Mine Safety and Health Review Commission*, 671 F.2d 615 (D.C. Cir. 1982) and appears as Appendix A.

The decision of the Commission in the *Helen* Case, *Secretary of Labor v. The Helen Mining Co.*, is reported at 1 FMSHRC 1796 (1979) and appears as Appendix B. The decision of the Commission in *Kentland-Elkhorn Coal Corp. v. Secretary of Labor* is reported at 1 FMSHRC 1833 (1979) and appears as Appendix C. The decision of the Commission in *Secretary of Labor on behalf of Arnold J. Sparks, Jr. v. Allied Chemical Corp.* is reported at 1 FMSHRC 1947 (1979) and appears as Appendix D.

The decision of the Administrative Law Judge in *Secretary of Labor v. Helen Mining Co.* is reported at 1 FMSHRC 219 (1979) and appears as Appendix E. The decision of the Administrative Law Judge in *Kentland-Elkhorn Coal Corp. v. Secretary of Labor* is reported at 1 FMSHRC 89 (1979) and appears as Appendix F. The decision of the Administrative Law Judge in *Secretary of Labor on behalf of Arnold J. Sparks, Jr. v. Allied Chemical Corp.* is reported at 1 FMSHRC 1451 (1979), and appears as Appendix G.

JURISDICTION

The judgment of the court of appeals, entered on February 23, 1982, appears as Appendix H to this petition. The orders of the court denying Petitioners' timely petition for rehearing and suggestion for rehearing *en banc*,

entered on April 9, 1982, appear as Appendix I. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

This case involves the following provisions of the Mine Act:

1. Section 103(f), 30 U.S.C. § 813(f) (Supp. IV 1980), which appears as Appendix J;
2. Section 103(a), 30 U.S.C. § 813(a) (Supp. IV 1980), which appears as Appendix K; and
3. Section 103(i), 30 U.S.C. § 813(i) (Supp. IV 1980), which appears as Appendix L.

STATEMENT OF THE CASE

The statutory right involved in this case is the right of miners under Section 103(f), 30 U.S.C. § 813(f), to be compensated for the time spent accompanying Mine Safety and Health Administration ("MSHA") inspectors during their inspections of the nation's mines. Section 103(f) requires mine operators to compensate miners for participating in inspections that are "made pursuant to the provisions of subsection (a)." Section 103(a) provides for comprehensive inspections of all underground mines through a minimum of four regular inspections per year. 30 U.S.C. § 813(a).

The Mine Act also provides for certain other inspections apart from the regular inspections conducted pursuant to subsection (a). In the *Helen Mining* case, for example, MSHA conducted an inspection pursuant to

Section 103(i),[4] which authorizes special spot inspections of mines that release certain levels of methane gas.[5] To be distinguished from Section 103(a) regular inspections, Section 103(i) spot inspections are announced as separate inspections (Hearing Transcript in the *Helen Mining* case ("Tr.") at 35-36); they are recorded by MSHA as separate inspections (Appendix N); and they are described as different inspections by MSHA (Appendices M, N, O[6]). Unlike regular inspections, which cover every aspect of health and safety in the mine[7] and may require weeks or

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[4] Other examples of spot inspections include: Section 103(g)(1) spot inspections in response to certain requests by miners or their representatives; inspections under Section 202(g) authorizing the Secretary to make frequent spot inspections of the active workings of coal mines for compliance with respirable dust regulations; and inspections under Section 303(x) requiring the Secretary to inspect an entire coal mine prior to reopening previously abandoned or inactive portions of the mine. *See* 30 U.S.C. §§ 813(g)(1), 842(g), 863(x).

[5] The *Allied Chemical* case also involved a Section 103(i) spot inspection, while the *Kentland-Elkhorn* case involved a specialized electrical inspection required by MSHA.

[6] Appendices M, N and O are exhibits RX-1, RX-2 and RX-3 from the administrative hearing in the *Helen* case.

[7] Regular inspections include:

1. inspection of all active areas: the working faces, all travelways, air courses, and haulageways, such as belt haulages, track haulages and off-track haulages;
2. electrical inspection of the entire underground distribution system;
3. all surface areas;
4. preparation plant facilities, if any;
5. bathhouses;
6. checks on all record books;

months to complete,[8] the focus of a Section 103(i) spot inspection is limited to detecting only one hazard—excessive methane. As in the *Helen* case, the inspection is generally confined to conducting two limited tests, a test to measure methane with a methanometer and a test to measure air velocity with an anemometer (Tr. 19-20).

In both the *Helen* and *Kentland-Elkhorn* cases, miners' representatives were permitted to accompany MSHA inspectors on their respective spot inspections, but were not paid for the time spent with the inspectors. The inspectors subsequently issued citations and orders, which alleged that Petitioners' failure to compensate miners' representatives violated Section 103(f). Helen and Kentland-Elkhorn then sought administrative review of the orders before the Federal Mine Safety and Health Review Commission.[9] Both Administrative Law Judges

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7. such tests as respirable dust surveys, noise level surveys, rock dust surveys, rock dust samples, bottle sampling of air for methane and other gasses; and

8. checks on all required plans, such as roof control plans (Tr. 35).

In short, the inspector must check for compliance with over one hundred fifty pages of mandatory health and safety regulations that apply to coal mines alone. *See* 30 C.F.R. Parts 70 and 75 (1981).

[8] A regular inspection at the Helen mine normally requires 3 full months to complete.

[9] On April 25, 1978, the Secretary issued an Interpretive Bulletin that construed Sections 103(f) and 103(a) of the Mine Act as establishing a compensation right for every spot and regular inspection. 43 Fed. Reg. 17546 (1978). The first challenge to the Secretary's Interpretative Bulletin was brought by a trade association in federal court. Judge Gesell of the District Court for the District of Columbia, however, dismissed the complaint, in part, to permit the Commission

assigned to the cases rejected MSHA's interpretation of the Mine Act. [10] Appendices E and F.

On appeal from the *Helen* case the Commission affirmed, with two Commissioners dissenting, and held that miners were entitled to walkaround pay only with respect to the comprehensive regular inspections. [11] The Commission determined that the statute was ambiguous, but that the legislative history conclusively resolved the issue. The Commission relied specifically on a statement by Representative Carl D. Perkins, chief House sponsor of the Mine Act, chairman of the committee that reported the bill, and chief House conferee, who clearly explained that the walkaround pay right applied only to regular inspections. The Commission subsequently applied the *Helen* precedent to achieve a similar result in the *Kentland-Elkhorn* case.

The court of appeals reversed these rulings in a 2-1 decision, with Judge Tamm issuing a vigorous dissent. [12] The panel majority ruled that the Commission erred in even considering the legislative history because the statutory language was so clear. In his dissent, Judge Tamm concluded it was "difficult to believe that any objective reader could fail to conclude that subsections 103(a) and (f) are so ambiguity-ridden as to call out for

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to exercise its expertise in reviewing the Secretary's interpretation. *Bituminous Coal Operators' Ass'n v. Marshall*, 82 F.R.D. 350 (D.D.C. 1979).

[10] The Administrative Law Judges had jurisdiction over these cases under Section 113(d)(1), 30 U.S.C. § 823(d)(1).

[11] The jurisdiction of the Commission over the appeal is conferred by Section 113(d)(2)(A), 30 U.S.C. § 823(d)(2)(A).

[12] The jurisdiction of the court of appeals is conferred by Section 106(a)(1), 30 U.S.C. § 816(a)(1).

clarification." Appendix at 40a. Therefore, Judge Tamm turned to the legislative history and found that Representative Perkins's statement "was clear, directly on point, and prepared with great care; equally important, there is not the slightest contradiction of the details of his remarks at any place in the legislative history." Appendix at 43a-44a.

Petitioners timely filed a petition for rehearing and suggestion for rehearing *en banc*. The court denied these requests on April 9, 1982.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals' Decision Is In Direct And Irreconcilable Conflict With The Explicit Directions Of This Court.

The panel majority ruled that the Commission "erred in even considering" the only relevant legislative history on the issue raised in this case. Appendix at 15a. That legislative history is a lengthy statement delivered by Representative Carl D. Perkins to the full House immediately before the House adopted the Mine Act. Representative Perkins was a major proponent and the chief House sponsor of the Mine Act, the chairman of the House Committee that reported the bill to the House floor, the chairman of the Joint Conference Committee that produced the final version of the bill, and, as the Commission recognized, one of the leading figures in the development and passage of mine safety and health legislation in Congress. Appendix at 60a, 43a.

Representative Perkins appeared before the House in his official role as the representative of the Joint House-Senate Conference Committee to report on the conference version of the bill and to interpret the agreement reached by the House and Senate conferees. In reporting

the conclusions of both the Senate and House conferees, Representative Perkins stated:

> Mr. Speaker, before concluding my remarks I would like to address one aspect of the conference report that seems to be somewhat ambiguous.
>
> * * * *
>
> Section 103(f) provides that a miner's representative authorized by the operator's miners shall be given an opportunity to accompany the inspector during the physical inspection and pre- and post-inspection conferences pursuant to the provisions of subsection (a). *Since the conference report reference is limited to the inspections conducted pursuant to section 103(a), and not to those pursuant to section 103(g)(1) or 103(i), the intention of the conference committee is to assure that a representative of the miners shall be entitled to accompany the Federal inspector*, including pre- and post-conferences, at no loss of pay *only during the four regular inspections of each underground mine* and two regular inspections of each surface mine in its entirety, including pre- and post-inspection conferences.
>
> * * * *
>
> Since the conference report does not refer to any inspection, as did section 103(h) of the 1969 act, [13] but, rather to an inspection of any mine pursuant to subsection (a), *it is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay only for the regular inspections mandated by subsection (a), and not for the additional inspections otherwise required or permitted by the act.*

123 Cong. Rec. 35,410 (daily ed. Oct. 27, 1977), *reprinted in* Subcom. on Labor of the Senate Committee on Human

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[13] The 1977 Mine Act amended the Federal Coal Mine Health and Safety Act of 1969 ("1969 Act"). Pub. L. No. 91-173, 83 Stat. 747.

Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 (1978) ("Legislative History") at 1356-58 (emphasis added).

This authoritative statement by the leading House advocate for mine safety and health legislation was entirely ignored by the panel majority on the ground that the statute is unequivocally clear. The majority's ruling is in direct conflict with the explicit and repeated directions of this Court. *See Watt v. Alaska*, 451 U.S. 259, 266 (1981) ("the plain meaning rule is 'rather an axiom of experience rather than a rule of law, and does not preclude consideration of persuasive evidence [of a contrary statutory meaning].' "); *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10 (1976) (where legislative history is available, "there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' "); *see also Woelke & Romero Framing, Inc. v. NLRB*, 50 U.S.L.W. 4538, 4540 (1982) (even apparently unambiguous statutory language "must be interpreted in light of the statutory setting and the circumstances surrounding its enactment.' "); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("clearly expressed legislative intention" may override otherwise clear statutory language); *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 444 (1955) (the " 'plain meaning rule' . . . has not dominated our decisions. The contrary doctrine has prevailed."); *see generally* Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 Colum. L. Rev. 1299 (1975).

The panel majority did not seek to discredit the remarks of Representative Perkins by reference to other indicia of legislative intent, nor did it find more persua-

sive comments elsewhere in the legislative history. Quite the contrary, the court failed to consider Representative Perkins's remarks *at all*. Such disregard for explicit and authoritative legislative history flatly conflicts with the instructions of this Court.

Moreover, the Mine Act is so far from being unambiguous that Judge Tamm found it "difficult to believe that any objective reader could fail to conclude that subsections 103(a) and (f) are so ambiguity-ridden as to call out for clarification." Appendix at 40a. This view is supported by the following facts:

(1) the panel majority itself acknowledged that its interpretation was not "entirely unflawed" and that the statutory language contained "possible ambiguities," Appendix at 25a n.43;

(2) three of the five Commissioners disagreed with the panel majority's reading of the supposedly clear language of the Mine Act, *see* Appendix B;

(3) the two dissenting Commissioners filed separate opinions and dissented from the Commission majority on the basis of two entirely different readings of this same language, *Id.*;

(4) two out of three administrative law judges to consider the issue disagreed with the panel majority's reading of the Mine Act, *see* Appendices E, F and G;

(5) the panel majority admitted that the phrase "made pursuant to" (which governs the scope of the walkaround pay right) is ambiguous (Appendix at 13a, 18a), thereby acknowledging that the scope of the walkaround pay right is, by necessary implication, ambiguous.

If Congress had intended the walkaround pay right to apply to all inspections, then it could easily have used the phrase "any inspection" in Section 103(f) instead of refer-

ring to an inspection "made pursuant to the provisions of subsection (a)," the language actually chosen. In other sections of the Mine Act where Congress intended a provision to apply to all inspections, Congress specifically used the term "any inspection."[14] The reference in Section 103(f) to inspections that are "made pursuant to the provisions of subsection (a)" is therefore superfluous unless it is interpreted to limit the walkaround pay right in some manner.[15]

These statutory inconsistencies demonstrate the accuracy of Judge Tamm's comment that "no law professor will ever use the FMSA as a model of draftsmanship. . . ." Appendix at 36a. In this case, the statutory meaning cannot be satisfactorily resolved on the face of the Mine Act itself. It is in precisely this type of situation that resort to the legislative history is critical.

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[14] Congress used the phrase "any inspection" in the following sections:

Section 103(a), 30 U.S.C. § 813(a);
Section 103(g)(2), 30 U.S.C. § 813(g)(2);
Section 104(d)(1), 30 U.S.C. § 814(d)(1);
Section 104(d)(2), 30 U.S.C. § 814(d)(2);
Section 104(e)(1), 30 U.S.C. § 814(e)(1);
Section 104(e)(2), 30 U.S.C. § 814(e)(2);
Section 107(a), 30 U.S.C. § 817(a).

[15] This conclusion is reinforced by Congress's provision for certain spot inspections in subsections of Section 103 other than subsection (a). *E.g.*, Sections 103(g)(1), 103(i), 30 U.S.C. §§ 813(g)(1), 813(i). If Congress had intended Section 103(f) to apply to all inspections, it would not have referred specifically to subsection (a) alone. Congress would at least have referred to any inspection made "pursuant to Section 103," as it did in Section 104(g)(1). 30 U.S.C. § 814(g)(1). That Congress chose to limit Section 103(f) to only those inspections made pursuant to subsection (a) must indicate that the walkaround pay provision applies to something less than all inspections. The panel majority's decision fails to address this crucial inconsistency.

The only legislative history on point is the statement of Representative Perkins. This statement is unambiguous, authoritative, and directly resolves the issue in this case. Representative Perkins spoke not as a single legislator, but as the chairman of the House committee that reported the bill and the leader of the House conferees who revised the bill. Representative Perkins spoke on behalf of the joint conference committee to explain the meaning of the bill to the full House immediately prior to the final vote on the bill. It is well settled that statements on the floor by the committee member in charge of a bill "are regarded as being in the nature of supplemental committee reports and are accorded the same weight as formal committee reports." 2A Sutherland on Statutory Construction § 48.14 at 220 (4th ed. 1973); *see also* Appendix at 43a. Representative Perkins's statement falls precisely within this category and, as such, is due the greatest deference.

To avoid the devastating effect of this legislative history on the result the panel majority wanted to reach, the panel majority had to argue that Representative Perkins's statement was unreliable. The panel majority could not point to the usual indicia of unreliability, such as the ambiguous or unauthoritative nature of the statement in question, for Representative Perkins's statement was clear, directly on point and based on Representative Perkins's experience as the House sponsor of the 1977 and 1969 Acts. Rather, the panel majority focused on the timing of Representative Perkins's statement. The majority contended that because the statement was made to the House after the Senate had adopted the bill, the statement could not reflect the will of the Senate. As Judge Tamm wrote in his dissent, the panel majority's rationale on this point was "peculiar" in light of the legislative process itself. Appendix at 42a. One House

always acts before the other, but such action does not and cannot deprive the other of commenting authoritatively on the meaning of a statute before it. Representative Perkins was speaking on behalf of the entire House-Senate conference committee and thus represented the views of both the Senate and the House members who were responsible for the final bill.

Because it was familiar with the Mine Act's sponsors, the Commission knew that Representative Perkins was the leading House advocate of miners' rights and accorded his statement substantial weight.[16] As chief House conferee and chairman of the House Committee on Education and Labor which considered the House bill, Representative Perkins was in the best position to speak authoritatively both as to what the conferees intended and as to mine safety and health issues generally.[17] The

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[16] The Commission also noted that Representative Perkins was the principal sponsor of both the 1969 and 1977 Acts, the chairman of the House Committee on Education and Labor during the consideration and passage of both Acts, and the chief House conferee when both statutes were finalized in conference committee. Appendix at 60a.

[17] The panel majority cited various cases to suggest that Representative Perkins's statement should not be read as reflecting the intent of the entire Congress. *See Department of the Air Force v. Rose*, 425 U.S. 352, 365-66 (1976); *Jordan v. Department of Justice*, 591 F.2d 753, 767-71 (D.C. Cir. 1978); *Vaugh v. Rosen*, 523 F.2d 1136, 1142-43 (D.C. Cir. 1975). In those cases, however, there was a direct conflict between two parts of the legislative history and clear extrinsic evidence of efforts taken to taint the legislative history. In this case, no such conflict or evidence exists; Representative Perkins's statement is the only legislative history that is on point.

Moreover, this clearly is not a case where a special interest group surreptitiously inserted a self-serving statement into the legislative record. *See National Small Shipments Traffic Conf., Inc. v. CAB*, 618 F.2d 819, 828 (D.C. Cir. 1980). Instead, as the Commission and

panel majority's decision to ignore Representative Perkins's clear statement on the precise issue in this case is indefensible and should be reversed.

II. By Concluding That The Commission's Decision Was Entitled To No Weight, The Court Of Appeals Created A Conflict Among The Circuits And Eviscerated The Congressional Scheme That Established The Commission As The Authoritative Source On Matters Of Policy And Statutory Construction Under The Mine Act.

The panel majority did not simply ignore the leading House advocate on mine safety and health legislation, it also ruled that

> the Commission's construction [of Section 103(f)] is plainly incorrect and unsupportable by the terms of the Act and therefore entitled to *no* deference.

Appendix at 17a n.26 (emphasis added) (citation omitted). What the court found "plainly incorrect and unsupportable," however, was not the *holding* of the Commission, but rather additional *dictum* on a separate issue never raised by any party and addressed for the first time *sua sponte* by the Commission. The Commission held that the phrase "pursuant to the provisions of subsection (a)" limited a miner's walkaround *pay* right, but the Commission felt compelled to add that miners were still entitled to

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Judge Tamm explicitly recognized, Representative Perkins was the foremost House spokesman in favor of strict mine safety and health laws. Representative Perkins would have been the last person in the House to attempt to subvert the Mine Act through legislative chicanery. *See* Appendix at 60a, 43a.

accompany inspectors without pay on any inspection. The latter conclusion was unquestionably *dictum*. [18]

The court of appeals seized on this *dictum* to disregard entirely the Commission's *holding*. The only necessary elements of the Commission's holding were the following:

(1) the Commisson concluded that the phrase, "pursuant to the provisions of subsection (a)" was ambiguous, a conclusion with which the court expressly agreed (Appendix at 13a, 18a);

(2) the Commission concluded that authoritative and dispositive legislative history was available to resolve the ambiguity, a conclusion which the court could not contest.

Had the Commission stopped there, its decision unquestionably would have been entitled to deference and the court would have had no basis on which to disagree. But, because the Commission felt compelled to address a further issue in *dictum*, the Commission's total-

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[18] By commenting that the walkaround right extended to all inspections authorized by the Mine Act, the Commission bifurcated the scope of the walkaround right and the walkaround pay right. The panel majority vigorously disputed this aspect of the decision and devoted an entire section of its opinion to the co-extensiveness question. The scope of the walkaround right, however, has never been an issue in this case. Neither Helen nor the other intervenor-defendants contested the right of a miner to accompany inspectors on spot inspections. Indeed, the issue is unlikely ever to arise because the wage agreement between the miners and mine operators provides for a walkaround right on all inspections.

ly reasonable resolution of the only issue before it was completely ignored.[19]

By failing to give any deference to the Commission's construction of the Mine Act, the court's decision is in direct conflict with decisions of the Fourth, Sixth and Eighth Circuits. Those circuits, in addressing the statutory interpretations of the Commission's sister commission under the Occupational Safety and Health Act, 29 U.S.C. § 651, *et seq.* (1976),[20] have held that reasonable commission decisions are entitled to great deference, even if they conflict with interpretations of the Secretary. *Usery v. Hermitage Concrete Pipe Co.*, 584 F.2d 127 (6th Cir. 1978); *Marshall v. Knutson Construction Co.*, 566 F.2d 596 (8th Cir. 1977); *Dunlop v. Rockwell International*, 540 F.2d 1283 (6th Cir. 1976); *Brennan v. Gilles &*

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[19] The Commission's *dictum* was itself supported by legislative history, including other statements by Representative Perkins. Recognizing that the statute contained a possible drafting error, but that the legislative intent was clear, the Commission decided to follow the unambiguous legislative history in all respects and thereby resolve whatever inconsistencies existed in Section 103. Appendix at 57a-59a.

[20] When Congress set out to amend the 1969 Act, one of its principal objectives was to create an independent commission that would assume adjudicative functions under the Mine Act. Under the 1969 Act, these duties had been delegated by the Secretary of the Interior to a non-independent body, the Interior Board of Mine Operations Appeals. Congress rejected this approach and instead followed the scheme of the Occupational Safety and Health Act which created an independent commission for adjudicative and policymaking functions and committed the rulemaking and enforcement functions to the Secretary of Labor. Congress transferred authority over the Mine Act from Interior to the Department of Labor and created the Commission to provide an expert independent body for interpreting and reviewing the Secretary's actions in implementing the Mine Act.

Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974); *see also Bratton Corp. v. Occupational Safety and Health Review Commission*, 590 F.2d 273 (8th Cir. 1979).

The reasons for this deference were well-stated in *Brennan v. Gilles & Cotting, Inc.*, *supra*. That case involved the Occupational Safety and Health Review Commission ("OSHRC"), an agency comparable in all relevant respects to the Commission.[21] The court pointed out that "[t]he statute vests adjudicatory functions in the [OSHRC]" and that "Congress deliberately created the [OSHRC] separate and independent of the Secretary." 504 F.2d at 1262. The court explained that "Congress . . . created a specialized agency and spelled out in the statute itself that it would be composed of persons specifically qualified 'by reason of training, education, or experience.' " *Id.* (citation omitted). The court concluded that "the [OSHRC] was designed to have a policy role and its discretion therefore includes some questions of law." Otherwise, the OSHRC would be "little more than a specialized jury, an agency charged with fact finding." *Id.*

Precisely the same factors dictate deference to the Commission's construction of the Mine Act. Like the OSHRC, the Commission is an independent adjudicative body with an express policy role. Congress specifically empowered the Commission to review not merely questions of substantial evidence, but erroneous legal conclusions, "substantial questions of law, policy or discretion," (Section 113(d)(2)(A)(ii), 30 U.S.C. § 823(d)(2)(A)(ii)), and "novel" questions of policy (Section 113(d)(2)(B), 30 U.S.C. § 823(d)(2)(B)). Congress

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[21] Both the OSHRC and the Commission review actions taken by the Secretary of Labor to enforce health and safety laws.

chose an expert adjudicative body comprised of Commissioners selected "by reason of training, education, or experience." Section 113(a), 30 U.S.C. § 823(a). Thus, Congress created the Commission to "develop a uniform and comprehensive *interpretation* of the law," which would guide both mine operators and the Secretary of Labor in understanding what the Mine Act required. *Nomination Hearings, Members of Federal Mine Safety and Health Review Commission, Before the Senate Committee on Human Resources*, 95th Cong., 2d Sess., 1 (1978) (emphasis added).

The court dodged the need to pay deference to the Commission, however, by creating a false issue. On the basis of its claimed inability to accept the Commission's dictum, the panel majority bootstrapped itself into disregarding the Commission's holding. This stratagem effectively stripped the Commission of the legal and policymaking roles Congress intended the Commission to have [2] and relegated it to a mere fact-finding body. This result is in direct contravention of Congress's scheme which divided the lawmaking and policymaking functions between the Secretary and the Commission.

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[2] As the Fourth Circuit has recognized, to give the Congressional scheme any meaning, the decisions of federal safety and health review commissions must carry substantial weight. *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d at 1262. Without such deference the Secretary's interpretations would be the sole source of administrative expertise on legal and policy questions. Had Congress intended the Secretary's views to have exclusive weight on legal and policy issues, however, there would have been no need to create an expert independent commission. It is the Commission, not the Secretary, that Congress intended to provide the final and authoritative interpretation of the Mine Act.

The panel majority's substitution of its own judgment for the expertise of the Commission led the majority into an egregious misstatement of the policies underlying the walkaround pay provision. With virtually no discussion, the panel majority concluded that Congress could not have intended to compensate miners for the regular inspections alone. Appendix at 23a. Regular and spot inspections, however, are entirely different in scope and purpose. Because regular inspections are detailed and extensive, it is conceivable that miners accompanying inspectors on these inspections could improve the inspector's effectiveness by providing another "pair of eyes" and could enhance miner consciousness as to the complex regulatory scheme created by the Mine Act. Spot inspections, by contrast, usually focus on one hazard and usually involve narrow, technical procedures. For example, the spot inspection at issue in the *Helen* case involved only two tests: one for methane concentration and one for air velocity. Another pair of eyes would not have assisted the inspector in conducting these tests, and observing the inspector perform these tests would hardly have enhanced the consciousness of miners who performed or observed similar tests on a regular basis. Thus, as the Commission recognized, sound policy reasons exist for distinguishing between spot and regular inspections consistent with the remedial functions of the Mine Act.

It was therefore improper for the court of appeals majority to disregard the Commission's holding and substitute its own opinion as to the underlying policies of the Mine Act for the Commission's interpretation of Congressional goals. A court is not free to disregard statutory limitations simply because it considers them "unsuited to achieving the general purpose in a particular case." *Commissioner v. Gordon*, 391 U.S. 83, 93 (1968). The panel majority, however, turned a deaf ear to this principle

and, with blind adherence to its tortured analysis, refused to accept the result that logic and candor compelled. The court of appeals exceeded all constraints on the proper functions of the judiciary, and its decision must be reversed.

CONCLUSION

In holding that the walkaround pay right extends to all inspections, the court of appeals flagrantly disregarded explicit and dispositive legislative history as well as the reasoned decision of the Commission. The panel majority's opinion directly conflicts with the teachings of this Court, with the opinions of the Fourth, Sixth and Eighth Circuits, and with the statutory scheme Congress created under the Mine Act.

A writ of certiorari should be granted and the court of appeals' decision reversed.

Respectfully submitted,

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